UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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LUEDERS, ROBERTSON & KONZEN

Alliance Companies, et al.	)	
Ameren Services Company on behalf of:	)	
Union Electric Company	)	
Central Illinois Public Service Company	)	
American Electric Power Service Corporation on behalf of:	)	
Appalachian Power Company	)	
Columbus Southern Power Company	)	
Indiana Michigan Power Company	)	
Kentucky Power Company	)	
Kingsport Power Company	)	
Ohio Power Company	)	
Wheeling Power Company	)	
The Dayton Power and Light Company	)	
Exelon Corporation on behalf of:	)	Docket Nos. EL02-65-000, -001, -002, -003, -004, -005, -006, -007 and -008
Commonwealth Edison Company	)	
Commonwealth Edison Company of Indiana, Inc.	)	
FirstEnergy Corporation on behalf of:	)	
American Transmission Systems, Inc.	)	
The Cleveland Electric Illuminating Company	)	
Ohio Edison Company	)	
Pennsylvania Power Company	)	
The Toledo Edison Company	)	
Illinois Power Company	)	
Northern Indiana Public Service Company	)	
and	)	
National Grid USA	)	
Midwest Independent System Operator	)	Docket No. EL02-111-000
PJM Interconnection, L.L.C.	)	

REQUEST FOR CLARIFICATION AND APPLICATION FOR REHEARING OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY AND COMMONWEALTH EDISON COMPANY OF INDIANA, INC. AND DAYTON POWER AND LIGHT COMPANY

Pursuant to Section 313 of the Federal Power Act ("FPA"),[1] and Rule 713 of the Commission's Rules of Practice and Procedure,[2] American Electric Power Service Corporation ("AEP") (on behalf of Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company), Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. ("ComEd") and Dayton Power and Light Company ("DP&L") (collectively, "New PJM Companies") request clarification and seek rehearing of the Commission's order issued July 31, 2002,[3] in the proceedings referenced above.[4]

I. INTRODUCTION AND EXECUTIVE SUMMARY

The New PJM Companies are very pleased that they may go forward with their plans to turn over functional control of their transmission assets now that the Commission has accepted their decisions to join PJM. As previously explained to the Commission, each of the New PJM Companies made its RTO selection on the basis of what it determined to be in the best interests of its customers, as well as its shareholders (to whom it owes a fiduciary duty), and is pleased that the Commission has decided to respect its choice. The New PJM Companies have identified

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1 16 U.S.C. § 8251 (2002).

2 18 C.F.R.§ 385.713 (2002).

3 *Alliance Companies, et al.*, 100 FERC ¶ 61,137 (2002) ("July 31 order").

4 The New PJM Companies are not filing this request for rehearing in Docket Nos. RT01-88, ER99-3144, EC99-80, ER01-2992, ER01-2993, ER01-2995, ER01-2997. These proceedings involved the proposal of the Alliance Companies to form the Alliance RTO. With the Commission's dismissal of requests for rehearing of its December 20, 2001 order, the Alliance Companies' RTO proposal no longer exists. The Commission concluded that the status reports filed by the Alliance Companies in Docket No. RT01-88-016 "are now moot and are dismissed since these filings have been superseded by the Petition for Declaratory Order. . . ." *Alliance Companies, et al.*, 99 FERC ¶ 61,105 at 61,431, *reh'g denied*, 100 FERC ¶ 61,137 at P 35 n.15 (2002) ("*Order on Petition*"). Docket No. RT01-88-016 was specifically terminated by the Commission in the *Order on Petition*, 99 FERC ¶ 61,105 at 61,450 Ordering Paragraph (D).

many reasons for having chosen PJM, but these reasons can summed up as the desire to be part of the standard of excellence that PJM exemplifies.[5] The Commission's recent Notice of Proposed Rulemaking ("NOPR") on Standard Market Design ("SMD")[6] proposes the adoption of many tariff and market features that already are in place within PJM. The New PJM Companies are eager to further the basic goals of the SMD NOPR as transmission owners participating in PJM, pursuing a standard of excellence.

A. The New PJM Companies Are Moving Forward With Integration Into PJM

As requested by the Commission, the New PJM Companies are moving forward with integration into PJM and are working toward completion of an agreement to form an independent transmission company ("ITC"), with National Grid as the managing member, which will operate within PJM West. Later this year, the New PJM Companies intend to make a joint rate filing with Illinois Power Company ("Illinois Power") and Virginia Electric Power Company ("Virginia Power") to reflect their participation under the PJM tariff. The rate filing will include a transition period rate design for maintaining revenue neutrality and minimizing cost shifts associated with the elimination of rate pancaking with PJM.

The New PJM Companies are firmly committed to working with PJM, the Midwest Independent System Operator ("Midwest ISO"), National Grid, transmission owners within PJM and the Midwest ISO and other stakeholders to eliminate seams between PJM and the Midwest ISO and the creation of a common market by October 2004. The New PJM Companies support the August 15, 2002 filing submitted by PJM setting forth a framework for cooperation between

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5 *See* Transcript of June 26, 2002 meeting at p. 235 (remarks of J. Craig Baker (AEP)).

6 "Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design," Docket No. RM01-12-000 (July 31, 2002).

PJM and the Midwest ISO to satisfy the conditions in the order applicable in whole or part to PJM.

B. The Commission Should Grant Clarification Of The July 31 Order

Notwithstanding their own steadfast commitment to these efforts and to the goals of the July 31 order, the New PJM Companies are concerned that the order includes a number of unsupported and unreasonable findings, and introduces significant uncertainty for the companies and their customers. The Commission is asking the New PJM Companies to "get on with it" at the same time it is placing the fate of the New PJM Companies' participation in PJM at considerable risk.[7] The New PJM Companies are being asked to spend millions of dollars to integrate into PJM and the PJM market with no assurance that they will be able to participate in PJM or the PJM market. Not only does the July 31 order leave open the question of whether the New PJM Companies will be permitted to participate in PJM, but it places the final answer to that question largely in the hands of others. The New PJM Companies fear that they could be ordered, at any point, to terminate their efforts to join PJM if the Commission determines that the conditions relating to creation of a PJM-Midwest ISO common market by October 2004 are unlikely to be satisfied, even if the cause for such non-satisfaction of the order's condition is due to recalcitrance or failure on the part of parties that are on record opposing the New PJM Companies' efforts to participate in the RTO of their choice.[8] This is patently unfair and unreasonable. The Commission should clarify on rehearing that its acceptance of the New PJM Companies' participation in PJM will not be revoked so long as the New PJM Companies act

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[7] *See* Transcript of July 17, 2002 meeting, at pp. 271-72 (CHAIRMAN WOOD: And I will say for the four of us, we would urge the New PJM Companies to get on with it today and not wait on that order.)

[8] For example, at the August 22, 2002 meeting of the Mid-America Interconnected Network ("MAIN") Operating Committee, Cinergy Services, Inc., which is on record as opposing the RTO choices of the New PJM Companies, was the sole committee member to vote against the reliability plan submitted by PJM.

prudently and in good faith to satisfy the conditions of the July 31 order. If the Commission does not provide the requested clarification, the New PJM Companies seek rehearing of that portion of the due to legal and factual errors.

The order also places PJM's RTO status in jeopardy pending satisfaction of the conditions relating to creation of a common market with the Midwest ISO. Thus, until these conditions are fully satisfied, the New PJM Companies are at risk of being found that they are not in an RTO, despite the fact that the companies have worked tirelessly and in good faith to join an RTO in the face of obstacles presented by inconsistent and contradictory Commission orders. The conclusion that, if it is expanded to include the New PJM Companies, PJM will not satisfy the functions and characteristics of Order No. 2000 absent creation of a common market with the Midwest ISO, is contradicted by substantial evidence in the record and by Commission precedent. The Commission should clarify on rehearing that PJM's RTO status is not contingent upon creation of a common market with the Midwest ISO. If the Commission does not provide the requested clarification, the New PJM Companies seek rehearing of that portion of the order due to legal and factual errors.

The Commission also should clarify that, in the July 31 order, it did not require the New PJM Companies to participate in an ITC and did not require PJM to adopt the Midwest ISO's agreements that provide for participation of new members and the delegation of functions to an ITC. If the Commission does not provide the requested clarification, the New PJM Companies seek rehearing of that portion of the order due to legal and factual errors.

The order finds that the RTO choices of the former Alliance Companies "standing alone, appear to produce unjust and unreasonable rates, terms and conditions for transmission

services."[9] This finding is premature and presumptuous. The Commission cannot determine whether rates, terms or conditions for service are just and reasonable until such time as such rates are filed for review. The New PJM Companies are working diligently with PJM, and in close consultation with the current PJM transmission owners, to prepare and file a rate filing to incorporate the New PJM Companies into the PJM tariff, and to eliminate rate pancaking within PJM while maintaining revenue neutrality and minimizing cost shifts during a transition period. This rate filing is essential to the incorporation of the New PJM Companies into PJM. It is unreasonable for the Commission to expect the New PJM Companies to proceed with dispatch in joining PJM at the same time the Commission is prejudging a rate filing to incorporate the New PJM Companies into the PJM tariff as unreasonable and unjust. The Commission should clarify on rehearing that it is not prejudging a rate filing to incorporate the New PJM Companies into the PJM tariff. If the Commission does not provide the requested clarification, the New PJM Companies seek rehearing of that portion of the order due to legal and factual errors.

The New PJM Companies also request the Commission to clarify that the Section 206 investigation of the through and out rates of PJM and the Midwest ISO is not intended to disrupt the significant work now well underway to integrate the New PJM Companies into PJM and to prepare and file the rate filing necessary for the New PJM Companies' participation in PJM later this year. The New PJM Companies further request the Commission to clarify on rehearing that the Section 206 investigation will not shift costs between the Midwest ISO transmission owners and the PJM transmission owners (including the New PJM Companies), and will not disrupt reasonable arrangements adopted by PJM transmission owners (including the New PJM Companies) for maintaining revenue neutrality and minimizing cost shifts within PJM. If the

[9] July 31 order at P 35.

Commission does not provide the clarifications requested herein, the New PJM Companies urge the Commission to grant their application for rehearing on these issues, as set forth below.

The July 31 also directs AEP, ComEd, Illinois Power, the Midwest ISO and PJM to "propose a solution which will effectively hold harmless utilities in Wisconsin and Michigan from any loop flows or congestion that results from the proposed configuration."[10] On rehearing, the Commission should clarify that (1) that it is not requiring AEP and ComEd to hold such utilities harmless unless it is demonstrated that incremental loop flow impacts of concern to these utilities are the direct result of the New PJM Companies' decisions to join PJM, (2) the Michigan and Wisconsin utilities are to be held "harmless" only following an analysis that includes: (a) a determination, for the same set of transactions, what different actions would have been taken by the RTO under different RTO choices, and (b) a determination of the actual impacts of those different choices on the Michigan and Wisconsin utilities, and (3) the New PJM Companies and other similarly-situated utilities joining PJM are to be held "harmless" from any loop flows or congestion that results from the RTO choices made by the other Alliance Companies. If the Commission does not clarify the July 31 order as requested, the New PJM Companies request rehearing of that portion of the order due to legal and factual errors.

C. The Commission Should Grant Rehearing Of The July 31 Order

The New PJM Companies also seek rehearing of the following rulings and findings in the July 31 order.

The order finds that the participation by the New PJM Companies in PJM will result in adverse operational and reliability effects. However, the order makes no findings and identifies no substantial evidence in the record to support this conclusion. Furthermore, the order does not

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[10] July 31 order at P 53.

provide any explanation as to how the conditions imposed by the order would prevent the perceived "adverse operational and reliability effects." The New PJM Companies seek rehearing of this finding because it is not supported by substantial evidence in the record and is contradicted by substantial evidence in the record.

The July 31 order directs the New PJM Companies to "file pursuant to section 203 to transfer operational control" of their facilities to PJM at such time as they seek to make effective their RTO choices. This requirement is at odds with the U.S. Court of Appeals' recent ruling of the U.S. Court of Appeals for the District of Columbia Circuit that "[a] utility does not 'sell, lease, or otherwise dispose' of its facilities when it agrees to the changes in operational control necessary to initially join or to withdraw from an ISO,"[11] and the Court's ruling that "FERC has no jurisdiction to require preapproval" of such transfers of operational control under section 203.[12] Therefore, on rehearing, the Commission should withdraw its Section 203 filing directive.

Finally, the New PJM Companies request that the Commission not "toll" their application for rehearing but, rather, make a decision promptly with respect to the legal and factual issues raised herein. In order to "get on with it," the New PJM Companies must incur or commit to incur significant amounts of money and to commit significant resources for the purpose of integrating into PJM. Consequently, time is of the essence in removing the risk and uncertainty created by some aspects of the Commission's July 31 order. Therefore, the New PJM Companies request that the Commission rule on this application for rehearing within the 30-day time frame contemplated in the FPA.[13]

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11 *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002) ("*Atlantic City*").

12 *Atlantic City*, 295 F.3d at 13.

13 16 U.S.C. § 825l(a) (2002).

III. REQUEST FOR CLARIFICATION

The July 31 order contains a number of unsupported and unreasonable findings that introduce significant uncertainty for the companies and their customers as they work toward integration into PJM. The Commission should, therefore, clarify certain of its rulings in the July 31 order in order to eliminate the uncertainty and risk for the New PJM Companies, as discussed below.

A. The Commission Should Clarify That The New PJM Companies' Ability To Join PJM Is Subject Only To Their Good Faith Efforts To Satisfy The Conditions In The July 31 Order

In the July 31 order, the Commission made its acceptance of the former Alliance Companies' RTO choices subject to several conditions. However, satisfaction of many of these conditions may be frustrated by the actions or inactions of others – including parties that have opposed the New PJM Companies' efforts to join PJM. Therefore, the Commission should clarify on rehearing that (1) its acceptance of the New PJM Companies' participation in PJM will not be revoked so long as the New PJM Companies act prudently and in good faith to satisfy the conditions of the July 31 order, (2) the New PJM Companies will not be required to discontinue their integration into PJM or otherwise face penalties so long as they prudently and in good faith work toward satisfaction of the conditions imposed in the July 31 order, (3) the New PJM Companies will not be penalized for the actions or inactions of other parties that result in failure to satisfy the conditions of the July 31 order (and subsequent Commission orders), and (4) the costs that the New PJM Companies incur in the integrating into PJM and in the course of their good faith efforts to comply with the Commission's July 31 order (and subsequent Commission orders) may be recovered in jurisdictional rates. If the Commission does not provide the

requested clarification, the New PJM Companies seek rehearing of the order's findings due to legal and factual errors.

B. The Commission Should Clarify That PJM's RTO Status Is Not Contingent Upon The Creation Of A Common Market With The Midwest ISO

In the July 31 order, the Commission found that it had only two options: (1) accepting each of the former Alliance Companies' RTO selections and having a single common market over the entire Midwest ISO/PJM region, or (2) rejecting at least some of the former Alliance Companies' RTO selections and having two appropriately configured RTOs with a more geographically contiguous boundary.[14] As a condition to its approval of the New PJM Companies' RTO choices, the Commission required "Midwest ISO and PJM to form a functional common market . . . by October 1, 2004,"[15] and threatened parties with unspecified "remedies" if the Commission has reason to believe that "this deadline may not be met."[16] The July 31 order, then, places PJM's RTO status in jeopardy pending satisfaction of the conditions relating to creation of a common market with the Midwest ISO. Until these conditions are fully satisfied, the New PJM Companies are at risk of a determination that they are not in an RTO, despite their tireless work and good faith efforts to join an RTO in the face of obstacles presented by inconsistent and contradictory Commission orders. In order to remove the uncertainty and risk created by the Commission's ruling, the Commission should clarify on rehearing that PJM's RTO status is not contingent upon the creation of a common market with the Midwest ISO. If the Commission does not provide the requested clarification, the New PJM Companies seek rehearing of the order's findings due to legal and factual errors.

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[14] July 31 order at P 38.

[15] *July 31 order at P 40.*

[16] July 31 order at P 41.

C. The Commission Should Clarify That It Is Not Prejudging The New PJM Companies' Rate Filing

The order finds that the RTO choices of the former Alliance Companies "standing alone, appear to produce unjust and unreasonable rates, terms and conditions for transmission services."[17] This finding is entirely arbitrary. The Commission cannot determine whether rates, terms or conditions for service are just and reasonable until such time as such rates are filed for review. Moreover, the New PJM Companies and PJM have the undisputed right, provided by Section 205 of the FPA, to file proposed rates, terms and conditions for services rendered with their assets.[18] The New PJM Companies are working diligently with PJM, and in close consultation with the current PJM transmission owners, to prepare and submit to the Commission a rate filing to incorporate the New PJM Companies into the PJM tariff, and to eliminate rate pancaking within PJM while maintaining revenue neutrality and minimizing cost shifts during a transition period. This rate filing is essential to the incorporation of the New PJM Companies into PJM. It is unreasonable for the Commission to expect the New PJM Companies to proceed with dispatch in joining PJM at the same time the Commission is prejudging as unjust and unreasonable a rate filing to incorporate the New PJM Companies into the PJM tariff. Therefore, the Commission should clarify on rehearing that it is not prejudging a rate filing to incorporate the New PJM Companies into the PJM tariff. If the Commission does not provide the requested clarification, the New PJM Companies seek rehearing of the order's finding due to legal and factual errors.

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17 July 31 order at P 35.

18 *Atlantic City*, 295 F.3d at 9-10.

D. The Commission Should Clarify That The Section 206 Investigation Will Not Shift Costs Between The Midwest ISO Transmission Owners And The PJM Transmission Owners

The July 31 order provides for the initiation of a Section 206 investigation in the through and out rates of the Midwest ISO and PJM to address the "disparity" between those rates. The New PJM Companies are committed to working with other transmission owners and market participants to reach consensus around an inter-RTO pricing arrangement between PJM and the Midwest ISO, provided the methodology does not impose costs upon the New PJM Companies for historical transmission transactions not involving the New PJM Companies and does not disrupt the emerging consensus around an intra-RTO arrangement for maintaining revenue neutrality and minimizing cost shifts within PJM.[19]

The Commission should clarify that arrangements for maintaining revenue neutrality and minimizing cost shifts associated with intra-RTO transactions should not impose costs on participants in another RTO. Arrangements between the New PJM Companies and the current PJM transmission owners concerning the recovery of transmission lost revenues should not impose costs on non-PJM transmission owners. Similarly, arrangements within the Midwest ISO for the recovery, or non-recovery, of transmission lost revenues associated with historical transactions among the Midwest ISO transmission owners should not impose costs upon PJM transmission owners or their customers. Transmission owners in PJM (including the New PJM Companies) and customers taking service in PJM should bear no responsibility for transmission lost revenues associated with historical transactions between transmission owners in the Midwest ISO, and vice versa. Respect for internal RTO arrangements concerning lost revenues is

[19] The methodology for maintaining revenue neutrality minimizing cost shifts within the expanded PJM will be consistent with the principles endorsed by the Commission in prior RTO and RTO-related orders, but the methodology is likely to more closely resemble the specific arrangements approved in *PJM West* that in the prior Alliance orders.

essential to mitigating potential costs shifts among transmission owners and customers, consistent with the order approving the *Illinois Power* Settlement[20] and the *Order on Petition*.[21]

The following table summarizes how responsibility for recovery of historical transmission lost revenues should be allocated among the RTOs in an inter-RTO pricing arrangement.

Lost Revenues (transaction type)	**Responsibility For Recovery**
Intra-MISO transactions	Not recoverable within PJM; recoverable within MISO (if intra-RTO arrangement so provides)
Intra-PJM transactions	Not recoverable within MISO; recoverable within PJM (if intra-RTO arrangement so provides)
MISO-to-PJM transactions	Recoverable within PJM, but not MISO
PJM-to-MISO transactions	Recoverable within MISO, but not PJM

The New PJM Companies request that the Commission clarify that the Section 206 investigation into the Midwest ISO and PJM through and out rates should respect intra-RTO arrangements for maintaining revenue neutrality and minimizing cost shifts during a transition period. The New PJM Companies respectfully request that the Commission be mindful of these equitable considerations.[22] If the Commission does not provide the requested clarification, the New PJM Companies request rehearing of the Commission's decision to establish a Section 206 proceeding, as discussed more fully below.

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[20] *Illinois Power Co., et al.*, "Order on Settlement Agreement," 95 FERC ¶ 61,183, *reh'g denied*, 96 FERC ¶ 61,026 (2001).

[21] *Order on Petition*, 99 FERC ¶ 61,105 at 61,444-45.

[22] If a PJM-Midwest ISO Super-regional rate structure is adopted, the Commission should ensure that market participants, such as DTE, are not able to avoid their responsibility for maintaining transmission revenue neutrality during the transition period. In particular, the Michigan Joint OATT should not be allowed to become a vehicle for by-passing charges adopted to collect historical transmission lost revenues.

E. The Commission Should Clarify That It Is Not Requiring AEP And ComEd To Hold Michigan And Wisconsin Utilities "Harmless" Against Loop Flows Not Caused By Those Companies' Decisions to Join PJM

The July 31 order directs AEP, ComEd, Illinois Power, the Midwest ISO and PJM to "propose a solution which will effectively hold harmless utilities in Wisconsin and Michigan from any loop flows or congestion that results from the proposed configuration."[23] As a result of this requirement, AEP and ComEd are at risk for potentially millions of dollars in order to hold Michigan and Wisconsin utilities "harmless" from loop flows that are not caused by the New PJM Companies' decisions to join PJM. Therefore, the Commission should clarify that it is not requiring AEP and ComEd to hold such utilities harmless unless it is demonstrated that incremental loop flow impacts of concern to these utilities are the direct result of the New PJM Companies' decisions to join PJM. The Commission also should clarify that the Michigan and Wisconsin utilities are to be held "harmless" only following an analysis that includes: (a) a determination, for the same set of transactions, what different actions would have been taken by the RTO under different RTO choices, and (b) a determination of the actual impacts of those different choices on the Michigan and Wisconsin utilities. The Commission should further clarify that the New PJM Companies and other utilities joining PJM are to be held "harmless" from any loop flows or congestion that result from the RTO choices made by the other Alliance Companies. In the July 31 order, the Commission required PJM and the Midwest ISO to "analyze changes in loop flows and congestion . . . and post the expected financial and operational impacts . . . prior to adding new members . . . ."[24] On rehearing, the Commission should clarify what it means by "financial impacts." Finally, the Commission also should clarify that any utilities that are required in the July 31 order to hold other utilities harmless with respect

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23 July 31 order at P 53.

24 July 31 order at P 54.

to loop flows should file their proposals to satisfy this requirement as part of their anticipated Section 205 rate filings. If the Commission does not clarify the July 31 order as requested, the New PJM Companies request rehearing of the Commission's "hold harmless" condition, as discussed more fully below.

F. The Commission Should Clarify That It Did Not Require The New PJM Companies To Join An ITC Or Have Agreements Identical To Those Of The Midwest ISO With Respect To Participation Of New Members And The Delegation Of Functions To An ITC

In the July 31 order, the Commission stated that "[o]ne mitigating factor in approving the RTO choices of the [former] Alliance Companies is the ability of National Grid to possibly bridge both organizations and manage the seams between Midwest ISO and PJM until a common market is developed."[25] In addition, the July 31 order provides that "there should be *pro forma* agreements under the respective tariffs of the Midwest ISO and PJM that provide for participation of new members and the delegation of functions to an ITC"[26]

As the New PJM Companies have explained to the Commission, under the terms of their memorandum of understanding with PJM, they have the option of joining PJM either as part of an ITC or as individual TOs.[27] The New PJM Companies will make their respective determinations whether to join PJM as part of an ITC or as individual TOs depending on their conclusions as to which approach makes the most sense for the companies and their customers. Therefore, the Commission should clarify that the July 31 order did not require the New PJM Companies to join an ITC and that the New PJM Companies may join PJM either as part of an ITC or as individual TOs. Similarly, the Commission should clarify that the July 31 order merely required PJM to have its own agreements under its tariff that provide for participation of

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25 July 31 order at P 43.

26 July 31 order at P 44.

27 Memorandum of Understanding, filed in this proceeding on June 25, 2002, section 1.1.

new members and the delegation of functions to an ITC – and not that these agreements be identical to those of the Midwest ISO. Each RTO must retain the ability to address the unique facts and circumstances it faces, and should not be required to adopt the agreements of other RTOs which may face completely different facts and circumstances. If the Commission does not provide the clarification requested, the New PJM Companies seek rehearing of that portion of the July 31 order, as discussed below.

IV. STATEMENT OF ERROR

The Commission should reverse the following rulings in its July 31 order because they are arbitrary, capricious, unduly discriminatory and an abuse of the Commission's discretion, for the following reasons:

The Commission erred, both as a matter of fact and of law, in finding that the New PJM Companies' voluntary decisions to join PJM "appear to produce unjust and unreasonable rates, terms, and conditions for transmission services." The Commission cannot determine the justness and reasonableness of rates to reflect the New PJM Companies' integration into PJM prior to the filing of those rates under Section 205 of the FPA.

The Commission erred in establishing a Section 206 investigation concerning the rates for through-and-out service under the PJM tariff and associated revenue distribution because the Commission provided no factual basis for the investigation.

The Commission erred, both as a matter of fact and of law in concluding that, absent conditions, there could be significant adverse operational and reliability effects leading to the proposed choices not being in the public interest. The Commission's conclusions are unsupported by substantial evidence in the record and, indeed, are contradicted by substantial evidence in the record.

The Commission erred in concluding that an expanded PJM to include the New PJM Companies would no longer be an "appropriately configured" RTO, absent the formation of a single common market over the entire Midwest ISO/PJM region. This conclusion is unsupported by substantial evidence in the record, is contradicted by substantial evidence in the record and is inconsistent with the Commission's Order No. 2000[28] and other Commission orders.

The Commission erred in requiring that the New PJM Companies join an RTO. The Commission has no authority under the FPA or Order No. 2000 to impose such a requirement.

The Commission erred in accepting the New PJM Companies' compliance filings subject to the formation of a common market by October 1, 2004. The Commission has failed to establish that PJM, expanded to include the New PJM Companies, would not satisfy the requirements of Order No. 2000. Accordingly, the Commission has no authority to condition the New PJM Companies' participation in the PJM RTO upon the creation of a common market with the Midwest ISO. In addition, substantial evidence does not support the October 1, 2004 deadline for the creation of the common market.

The Commission erred in requiring the New PJM Companies to seek approval under Section 203 of the FPA. Under applicable precedent, the Commission is without authority to require the New PJM Companies' to seek Commission approval of their transfer of operational control under Section 203 of the FPA.

The Commission erred in directing AEP, ComEd, Illinois Power, Midwest ISO and PJM to propose a solution which will effectively hold harmless utilities in Wisconsin and Michigan

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[28] *Regional Transmission Organizations*, Order No. 2000, FERC Statutes and Regulations, Regulations Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Statutes and Regulations, Regulations Preambles ¶ 31,092 (2000), *petitions for review dismissed, Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

from any loop flows or congestion that results from the proposed configuration. This condition is unsupported by substantial evidence in the record, unduly discriminatory and vague.

On rehearing, the Commission should reverse these rulings.

V. THE COMMISSION ERRED IN MAKING FINDINGS ABOUT THE JUSTNESS AND REASONABLENESS OF FUTURE RATE FILINGS AND IN FAILING TO JUSTIFY ITS INVESTIGATION INTO PJM'S EXISTING THROUGH AND OUT RATE

In the July 31 order, the Commission found that "the [former] Alliance Companies' [RTO] choices, standing alone, appear to produce unjust and unreasonable rates, terms, and conditions for transmission services."[29] This finding is entirely arbitrary, as it is unsupported by a rational explanation and substantial evidence in the record. The Commission has also failed to justify its investigation of PJM's through and out rates which the Commission previously has found to be just and reasonable.

A. The Commission Cannot Determine The Justness and Reasonableness Of Rates To Reflect The New PJM Companies' Integration Into PJM Prior To The Filing Of Those Rates Under Section 205 Of The FPA

The Commission has failed in the July 31 order to explain how the decisions of the former Alliance Companies to join RTOs would "produce unjust and unreasonable rates, terms and conditions for transmission services." The New PJM Companies have not proposed any rates, charges or terms and conditions of service for Commission approval under Section 205 of the FPA. The Commission cannot know what the rates, terms and conditions for transmission services resulting from the integration of the New PJM Companies into PJM will be prior to the filing of those rates later this year. Therefore, on rehearing, the Commission should reverse its presumptive and premature conclusion as to the justness and reasonableness of rates that have not yet been proposed.

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[29] July 31 order at P 35.

The FPA requires that factual determinations by the Commission be supported by substantial evidence in the record.[30] In the July 31 order, however, the Commission has failed to provide substantial evidence supporting its finding that "the New PJM Companies' choices, standing alone, appear to produce unjust and unreasonable rates, terms and conditions for transmission services." "Substantial evidence" "is more than a 'mere scintilla,'"[31] and the Commission did not even provide a scintilla of evidence to support its finding; it provided only a bald assertion. It is well-established, however, that "an agency's unsupported assertion does not amount to 'substantial evidence.'"[32] Thus, the Commission's finding that the New PJM Companies' RTO choices, standing alone, appear to produce unjust and unreasonable rates, terms and conditions for transmission is entirely arbitrary and should be reversed on rehearing.

B. The Commission Has Failed To Justify Its Section 206 Investigation Of The Existing PJM Through and Out Rate

The Commission has provided no factual basis for establishing a Section 206 investigation of PJM's existing Commission-approved through-and-out rate. In ordering the Section 206 investigation, the Commission alluded to a "disparity" in the PJM and the Midwest ISO though-and-out rates. It is, however, axiomatic that "[t]he mere fact of a rate disparity" is not enough to constitute unlawful discrimination.[33] On the contrary, the courts have found "undue discrimination" occurs only when a utility's rates create a "preference without a

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30 16 U.S.C. 825l(b) (2002) and *see e.g.*, *Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981) *citing American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1029 (D.C. Cir. 1977) ("What is basic is the requirement that there be support in the public record for what was done.")

31 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (*citing Appalachian Elec. Power Co. v. NLRB*, 93 F.2d 985, 989 (4th Cir. 1938).

32 *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991).

33 *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir.), *cert. denied*, 469 U.S. 917 (1984).

reasonable basis" – where there is no underlying factual or equitable basis for it.[34] Factual differences justifying a rate disparity may be "cost of service or otherwise."[35] Thus, the mere fact of a rate disparity does not justify the establishment of a Section 206 proceeding.

In support of the Section 206 investigation into PJM's through and out rate, the July 31 order asserts that "one of the primary obstacles to RTO formation has been rate pancaking for transactions crossing the RTO borders,"[36] but identifies no record evidence to support this assertion. In fact, the assertion is contradicted by the Commission's orders approving RTOs and by substantial evidence in the record. RTO formation in the geographic area spanning "from New Jersey in the East to the Rocky Mountains in the West" (that is, the regions covered by PJM and the Midwest ISO) has far outpaced RTO formation in other areas of the country, and the expanded PJM and the Midwest ISO are the two largest RTOs in the country. The Commission has already granted full RTO status to the Midwest ISO and has provisionally approved PJM as an RTO.[37] The expansion of PJM to include the New PJM Companies will satisfy the Commission's desire that PJM expand westward and allow PJM to achieve full RTO status. The existing rates of both RTOs have been found to be just and reasonable. These facts directly contradict the Commission's assertion that rate pancaking for transactions crossing the RTO borders is an obstacle to RTO formation for the Midwest ISO and PJM.

The order incorrectly cites the transcript of the Commission's July 17, 2002 meeting as support for the statement that "both the Midwest ISO and PJM agree" with the Order's statement

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[34] *St. Michaels Utilities Comm'n v. FERC*, 377 F. 2d 912, 915 (4th Cir. 1967); *Public Serv. Co. of Ind. v. FERC*, 575 F.2d 1204, 1212 (7th Cir. 1978). *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1316 (*citing Sebring Utilities Comm'n v. FERC*, 591 F.2d 1003, 1010 n.28 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979)).

[35] *City of Frankfort v. FERC*, 678 F.2d 699, 706 (7th Cir. 1982).

[36] July 31 order at P 49.

[37] *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *reh'g pending*; *PJM Interconnection LLC and Allegheny Power*, 96 FERC ¶ 61,061 (2001), *reh'g pending*.

that rate pancaking for transactions crossing RTO borders is a primary obstacle to RTO formation.[38] In fact, the referenced page of the transcript contains no such support. The transcript elsewhere reflects that Mr. William Phillips, Vice President of Operations for the Midwest ISO, stated that the two RTOs agree that through and out rates for inter-RTO transactions "is an issue."[39] However, this statement does not support the order's assertion that inter-RTO rate pancaking is a primary obstacle to RTO formation, the Section 206 investigation into PJM's through and out rate, or the order's premature and presumptive conclusion that the RTO choices of the former Alliance Companies appear to produce unjust and unreasonable rates, terms and conditions for transmission service.

C. New Rates Will Be Filed Under Section 205 To Reflect The Integration Of The New PJM Companies

The Commission's initiation of a Section 206 proceeding does not cut-off the rights of the New PJM Companies or other utilities, under Section 205 of the FPA, to file proposed rates, terms and conditions for services rendered with their assets.[40] As PJM pointed out in its August 15 filing, "[i]t is the revenue requirements of the numerous transmission owners across the two regions that are at stake in resolving this issue." PJM further stated that it will "rely on the transmission owners who have the right to unilaterally file a rate design, to develop proposed rate designs and present them to the stakeholders for potential settlement of this issue."[41]

The New PJM Companies anticipate that they and PJM will file rate changes to the PJM tariff under Section 205 later this year. There is little value in investigating rates that will be superceded in the foreseeable future. In fact, such an investigation has the potential to waste

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38 July 31 order at P 49 n.22.

39 *Transcript of* July 17, 2002 meeting at pp. 176-77.

40 *Atlantic City*, 295 F.3d at 10.

41 Statement of PJM Interconnection, L.L.C. Regarding Conditions, Docket Nos. EL02-65-000 (August 15, 2002) ("PJM filing"), p. 4, *citing Atlantic City*.

valuable time and resources which could better be expended in integrating the former Alliance Companies into their respective RTOs and reviewing proposed rates to reflect such integration. Issues relating to the pricing of inter-RTO transactions should be addressed in an orderly fashion; that is, after the former Alliance Companies have been integrated in their respective RTOs. Therefore, on rehearing, the Commission should terminate the Section 206 proceeding established in Docket No. EL02-111-000.

VI. THE COMMISSION ERRED IN CONCLUDING THAT, ABSENT CONDITIONS, THE NEW PJM COMPANIES' CHOICES TO JOIN PJM COULD RESULT IN SIGNIFICANT ADVERSE OPERATIONAL AND RELIABILITY EFFECTS LEADING TO THE PROPOSED CHOICES NOT BEING IN THE PUBLIC INTEREST

In the July 31 order, the Commission concluded that, absent conditions, there could be significant adverse operational and reliability effects leading to the former Alliance Companies' RTO choices not being in the public interest. This conclusion is arbitrary, as it is unsupported by a rational explanation and substantial evidence in the record. In fact, the Commission's conclusion is contradicted by substantial evidence in the record.

A. The Commission's Conclusion That, Absent Conditions, The New PJM Companies' Choices To Join PJM Could Result In "Adverse Operational And Reliability Effects" Is Unsupported By Substantial Evidence In The Record

In the July 31 order, the Commission did not explain precisely what "adverse operational and reliability effects" could arise as a result of the New PJM Companies' choices to join PJM, absent conditions. The Commission simply "noted" that four concerns were identified and discussed at the meeting between the North American Electric Reliability Council ("NERC"), MAIN, the East Central Area Reliability Coordinating Agreement ("ECAR"), the Midwest ISO and PJM representatives held on July 11, 2002.[42] However, the Commission made no findings

[42] July 31 order at P 46.

and identified no substantial evidence in the record to support the conclusion that these four concerns would, in fact, be realized if the New PJM Companies were to join PJM absent conditions. Furthermore, the Commission did not provide any explanation as to how the conditions it imposed in the July 31 order would prevent the perceived "adverse operational and reliability effects" that could result from the former Alliance Companies' RTO choices. The Commission has identified no nexus between the conditions it is imposing and the perceived "adverse operational and reliability effects."

The FPA requires that factual determinations by the Commission be supported by substantial evidence in the record.[43] However, the Commission's conclusory statement that, absent conditions, there could be significant operational and reliability effects leading to the proposed choices not being in the public interest does not amount to 'substantial evidence.'"[44] Because the Commission's conclusion is entirely arbitrary, it should be reversed on rehearing.

B. The Commission's Conclusion Is Contradicted By Substantial Evidence In The Record

Moreover, the Commission's conclusion is contradicted by substantial evidence in the record. At its June 26, 2002 meeting, the Commission identified reliability as its major concern with respect to the RTO choices of the former Alliance Companies,[45] and specifically requested that NERC examine the reliability implications of the RTO choices of the former Alliance

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[43] 16 U.S.C. 825l(b) (2001) and *see e.g.*, *City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981) ("What is basic is the requirement that there be support on the public record for what was done.")

[44] *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991).

[45] Transcript of June 26, 2002 meeting at pp. 262-63, 279, 357, 365, 369 and 375.

Companies.[46] The Commission's order, however, does not even summarize – let alone, discuss – the report that NERC made to the Commission on July 17, 2002.

At the Commission's July 17 meeting, representatives of NERC informed the Commission that NERC has "not yet identified a significant reliability issue that would disqualify this proposed configuration."[47] Although NERC indicated that it would have to review detailed reliability plans from the RTOs to ensure that the reliability issues that had been raised were addressed adequately, NERC indicated that, "[b]ased on the information that has been presented to us, and the discussions at the July 11th meeting, we have not – we did not identify yet a reliability issue that would disqualify the proposed configuration."[48] Thus, NERC specifically took into consideration the four concerns noted in the July 31 order, and concluded that it had not identified a single reliability issue that would prohibit the New PJM Companies from joining the RTO formed by PJM.

Indeed, NERC specifically recommended that the Commission condition its approval of the proposed RTO configurations on "MISO's and PJM's agreement that the solutions they jointly develop for managing seams issues are feasible and effective; and . . . NERC's review and approval of each stage of the revised MISO and PJM reliability plans."[49] NERC also expressed the view that "we don't believe that MISO or PJM should have to file their reliability plan in one piece."[50] Rather, NERC explained that it expects that the Midwest ISO and PJM will

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[46] July 31 Order at P 19. *See also*, Transcript of June 26, 2002 meeting at p. 369 (CHAIRMAN WOOD: What I would like to do is, between now and the next meeting. . . is have the member Companies, but particularly the two of you all and NERC and Grid as well, sit down and talk through some of these reliability issues.")

[47] Transcript of July 17, 2002 meeting at p. 86.

[48] Transcript of July 17, 2002 meeting at p. 96.

[49] Transcript of July 17, 2002 meeting at p. 94.

[50] Transcript of July 17, 2002 meeting at p. 86.

"be filing their reliability plans as they go to implement various stages of their plans."[51] The New PJM Companies and PJM did not object to these recommendations by NERC. Indeed, Michael Kormos[52] of PJM explained to the Commission that these efforts would be undertaken in any event, and that ". . . bottom line, we would only be unreliable if we allow it."[53]

In its August 15 filing in response to the July 31 order, PJM explained how it is working with the Midwest ISO and NERC to ensure reliability.[54] Therefore, because the Commission has failed to support its claim – in fact, the record in this proceeding contradicts the Commission's claim – and because PJM and the Midwest ISO are working voluntarily with NERC to ensure reliability as the two RTOs integrate the former Alliance Companies, the Commission's conclusion that, without conditions, there could be significant adverse operational and reliability effects leading to the proposed choices not being in the public interest is entirely without foundation and should be reversed on rehearing.

VII. THE COMMISSION ERRED IN CONCLUDING THAT, ABSENT A SINGLE COMMON MARKET OVER THE ENTIRE MIDWEST ISO/PJM REGION, IF THE NEW PJM COMPANIES JOIN PJM, THEN PJM NO LONGER IS AN "APPROPRIATELY CONFIGURED" RTO

In the July 31 order, the Commission found that it had only two options: (1) accepting each of the former Alliance Companies' RTO selections and having a single common market over the entire Midwest ISO/PJM region, or (2) rejecting at least some of the former Alliance Companies' RTO selections and having two appropriately configured RTOs with a more

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51 Transcript of July 17, 2002 meeting at p. 86.

52 Executive Director of System Operations, PJM.

53 Transcript of July 17, 2002 meeting at p. 160.

54 PJM filing at p. 3. ("As described by NERC at the Commission's meeting on July 17, 2002, PJM and Midwest ISO will be providing Reliability Plans to NERC on a phased basis as more detailed solutions are developed regarding reliability issues. The first such report will be submitted to NERC in September, as the Commission describes. Subsequently, before each market area is introduced, additional Reliability Plans will be submitted to NERC for approval.")

geographically contiguous boundary.[55] Implicit in the Commission's statement is a finding that if the New PJM Companies join PJM, absent a single common market over the entire Midwest ISO/PJM region, PJM would not be an "appropriately configured" RTO. This conclusion is unsupported by substantial evidence in the record, is contradicted by substantial evidence in the record and is inconsistent with Order No. 2000 and other Commission orders. On rehearing, the Commission should find that the expansion of PJM to include the New PJM Companies is consistent with Order No. 2000 and orders provisionally approving the PJM RTO.

A. The Commission's Conclusion Is Unsupported By Substantial Evidence In The Record And, In Fact, Is Contradicted By Substantial Evidence In The Record

The FPA requires that factual determinations by the Commission be supported by substantial evidence in the record.[56] In the July 31 order, however, the Commission has identified no substantial evidence in the record to support its conclusion that the PJM RTO expanded to include the New PJM Companies would not be an "appropriately configured" RTO. Indeed, contrary to the Commission's conclusion, substantial evidence in the record of this proceeding establishes that the New PJM Companies are highly interconnected with each other and with PJM, and that the expanded PJM recognizes trading patterns within the region.

1. The New PJM Companies joining PJM are highly interconnected with each other and with PJM

In the July 31 order, the Commission appears to define an "appropriately configured" RTO as one with a "more geographically contiguous boundary."[57] There is, however, no requirement in Order No. 2000 or the Commission's RTO regulations that an RTO have a

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55 July 31 order at P 38.

56 16 U.S.C. 825l(b) (2002) and *see e.g., City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981) ("What is basic is the requirement that there be support on the public record for what was done.")

57 July 31 order at P 38.

"geographically contiguous boundary." Moreover, the record in this proceeding establishes that, in determining the appropriateness of an RTO's configuration, "[t]he issue is the topography, not the geography."[58] This is because electric characteristics of the transmission system – not state boundaries – dictate how electricity flows. The Extra-High Voltage ("EHV") system, consisting of 345 kV and higher lines of the Eastern Interconnection is the superhighway where business ultimately is conducted.[59] Consequently, the Commission should consider electrical interconnections – not geographic or political boundaries – in determining the appropriateness of an RTO configuration.

The evidence in this proceeding further establishes that the New PJM Companies are directly interconnected to one another, to other transmission owners joining PJM, and to PJM through EHV (345 kV, 500 kV and 765 kV) transmission lines. The New PJM Companies have submitted to the Commission exhibits showing the transmission interties between the New PJM Companies, Illinois Power and Virginia Power, and PJM (including PJM West). These interties consist of EHV transmission lines that provide sizeable transfer capability within the contiguous areas that corresponds with the expanded PJM. Because the New PJM Companies have demonstrated their interconnection with each other, with PJM and with other utilities joining PJM, the Commission has no basis for concluding that, absent conditions, an expanded PJM is not an "appropriately configured" RTO.

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58 Transcript of June 12, 2002 meeting at p. 93.

59 Transcript of June 12, 2002 meeting at p. 93.

2. The expanded PJM is configured so as to recognize trading patterns in the region

In Order No. 2000, the Commission concluded that appropriately configured RTO "regions should be configured so as to recognize trading patterns."[60] The PJM RTO expanded to include the New PJM Companies recognizes trading patterns in the region in the region.

This fact was established at the Commission's June 26, 2002 meeting where, at the Commission's request, representatives of the former Alliance Companies appeared to explain their decisions to join PJM.[61] Craig Baker[62] explained that AEP decided to join PJM because, among other things, "[t]he highway system . . . for transmission starts in central Illinois and flows east."[63] Elizabeth A. Moler[64] explained that ComEd's decision to join PJM was based on, among other things, the fact that PJM with AEP is ComEd's "natural market."[65] ComEd trades with Illinois Power, with AEP and PJM. In 2001, 62 percent of the energy sold by generators connected to ComEd's system was delivered to AEP.[66] Susan Flanagan[67] explained that DP&L decided to join PJM because, among other things, DP&L is highly interconnected with AEP and its service area is directly contiguous with that of AEP, and DP&L's service area is a logical extension of PJM or PJM West.[68] Kathy Patton[69] explained that Illinois Power decided to join PJM because, among other things, during 2000, 60 percent of Illinois Power's scheduled

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60 Order No. 2000 at 31,084.

61 Transcript June 26, 2002 meeting at pp. 219-221.

62 Senior Vice President, Regulation and Public Policy, AEP.

63 Transcript of June 26, 2002 meeting at p. 239.

64 Senior Vice President, Government Affairs and Policy, Commonwealth Edison Company.

65 Transcript of June 26, 2002 meeting at p. 283.

66 Transcript of June 26, 2002 meeting at p 291.

67 Vice President, Dayton.

68 Transcript of June 26, 2002 meeting at pp. 271-73.

69 Senior Vice President and General Counsel, Illinois Power.

deliveries went to the ComEd (41.1 percent) and AEP (19 percent) systems and over 44 percent of Illinois Power's exports served load in ComEd (14.2 percent), AEP (10.6 percent) and PJM (19.4 percent).[70] During 2001, 64 percent of imports for native load came from Illinois Power and AEP, while over 50 percent of Illinois Power's imports for native load came from ComEd and AEP.[71] No party has refuted these facts. Thus, the record evidence in this proceeding clearly supports the conclusion that that PJM expanded to include the New PJM Companies recognizes trading patterns, consistent with the requirements of Order No. 2000.

B. The Commission's Conclusion Is Inconsistent With Order No. 2000 And The Commission's Orders Approving The Midwest ISO And PJM RTOs

In the July 31 order, the Commission appears to have in mind some specific geographic regional boundary for the PJM RTO. Such a predetermined geographic regional boundary is inconsistent with Order No. 2000, the Commission's RTO regulations, the Commission's order conditionally approving PJM and the Commission's April 25 order which gave the New PJM Companies the option to join PJM.

1. Neither Order No. 2000 nor the Commission's RTO regulations establishes specific regional boundaries for RTOs

The Commission's apparent predilection for a specific regional boundary for the PJM RTO is inconsistent with Order No. 2000, in which the Commission concluded that it "is not proposing . . . the establishment of fixed or specific regional boundaries for RTOs."[72] Rather, the Commission emphasized that "[i]ndustry participants . . . retain flexibility in structuring RTOs that satisfy the minimum characteristics and functions."[73] In addition, the Commission's

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70 Transcript of June 26, 2002 meeting at p. 317.

71 Transcript of June 26, 2002 meeting at p. 317.

72 Order No. 2000 at 30,994.

73 Order No. 2000 at 30,994.

RTO regulations do not establish fixed or specific regional boundaries . . . [for RTOs]. The Commission's regulation pertaining to "scope and regional configuration" requires that an RTO must serve "an appropriate region" which, in turn, is defined as one that is "of sufficient scope and configuration to permit the [RTO] to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets."[74] In the July 31 order, the Commission (1) identified no evidence in the record that an expanded PJM would not be able to maintain reliability, effectively perform its required functions or support efficient and non-discriminatory power markets and (2) identified no RTO characteristics or functions that the expanded PJM would be unable to perform, absent conditions. Therefore, the Commission has no basis to conclude that, absent conditions, PJM expanded to include the New PJM Companies would not be an "appropriately configured" RTO.

2. The Commission's orders approving the PJM RTO explicitly encouraged PJM's expansion to the west

The July 31 order contradicts the Commission's conclusion in the order granting provisional RTO status to PJM that PJM should continue to expand west in order to enhance the RTO's scope and configuration. By order issued July 12, 2001, the Commission provisionally granted PJM RTO status,[75] concluding that, "while PJM's proposed scope and configuration are provisionally consistent with Order No. 2000, it represents only a first step, a platform which must be built upon."[76] The Commission specifically emphasized that "PJM should continue to expand in the region in addition to the potential addition of Allegheny Power and Duquesne as PJM West. Expansion to the west, to the north . . . and with other public power entities and other regional entities who submitted RTO filings with the Commission would enhance the scope and

74 18 C.F.R. § 35.34(j)(2) (2002).

75 *PJM Interconnection, L.L.C., et al.*, 96 FERC ¶ 61,061 (2001), *reh'g pending*.

76 96 FERC ¶ 61,061 at 61,232.

configuration of PJM and increase the RTO's importance in the region."[77] Expanding the PJM RTO to include the New PJM Companies results in PJM's expansion to the west of Allegheny, enhancing the scope and configuration of PJM. The Commission's conclusion in the July 31 order that this very westward expansion of PJM now results in an "inappropriately configured" RTO is directly at odds with the guidance given to PJM and interested parties by the Commission in 2001.

3. The Order on Petition order gave the New PJM Companies the option of joining PJM

The conclusion that westward expansion of PJM now results in an "inappropriately configured" RTO also is directly at odds with the guidance given to the former Alliance Companies in the *Order on Petition.* At the time that it issued the *Order on Petition*, the Commission was well aware that certain of the former Alliance Companies were negotiating with PJM as well as with the Midwest ISO.[78] Nothing in the *Order on Petition* even suggests that the Commission would find that PJM expanded to include all or some of the former Alliance Companies would result in an "inappropriately configured" RTO. On the contrary, the Commission explicitly gave each of the former Alliance Companies the option of joining PJM as long as they adhered to the Commission's directives on rate design and delegation of functions. The Commission emphasized that "the guidance provided herein regarding the rate design and delegation of functions is intended . . . to be applicable to Petitioners regardless of whether they join PJM, Midwest ISO or another RTO."[79] For the Commission now to conclude that

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[77] 96 FERC at ¶ 61,061 at 61,232 (emphasis added).

[78] *See e.g.*, The Energy Daily, April 25, 2002 (quoting Chairman Wood as saying, "We're not blind to the fact that they're having discussions with PJM. And that's fine.")

[79] *Order on Petition*, 99 FERC ¶ 61,105 at 61,430 (emphasis added). *See also*, *Order on Petition*, 99 FERC at 61,432 ("the findings we make . . . regarding Petitioners' proposals should not be viewed as limited to Petitioners' specific request to join the Midwest ISO. Petitioners should consider our findings as guidance with respect to their participation in any RTO they plan to join as a group or individually as separate ITC's.")

expanding PJM to include the New PJM Companies would result in an inappropriately configured RTO would be inconsistent with the very option given by the Commission in the *Order on Petition* – that of joining PJM. Therefore, on rehearing, the Commission should reverse this finding.

VIII. THE COMMISSION ERRED IN ACCEPTING THE NEW PJM COMPANIES' COMPLIANCE FILINGS SUBJECT TO THE FORMATION OF A "COMMON MARKET"

In the July 31 order, as a condition to its approval of the New PJM Companies' RTO choices, the Commission requires "Midwest ISO and PJM to form a functional common market by October 1, 2004,"[80] and threatens parties with unspecified "remedies" if the Commission has reason to believe that "this deadline may not be met."[81] The New PJM Companies wish to make clear that they fully support the goal of a common market and pledge to work toward meeting that goal. However, they request rehearing of the Commission's decision in the July 31 order to make the formation of a "common market" by October 1, 2004 a condition of its acceptance of the New PJM Companies' decisions to join PJM.

By accepting the New PJM Companies' RTO choices subject to the requirement that the Midwest ISO and PJM form a functional common market across the two organizations by October 1, 2004, the Commission erred in several respects. First, the Commission is without authority to impose this requirement under Section 205 of the FPA in the absence of substantial evidence that PJM, expanded to include the New PJM Companies, would not be able to satisfy the requirements of Order No. 2000 and the Commission's RTO regulations. Furthermore, the Commission's condition is inconsistent with Order No. 2000. Finally, substantial evidence in the record does not support the October 1, 2004 deadline established by the Commission. On

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80 July 31 order at P 40.

81 July 31 order at P 41.

rehearing, the Commission should remove this condition to its acceptance of the New PJM Companies' RTO choices and, instead, encourage PJM and the Midwest ISO to develop a common market as quickly as possible, consistent with reliable operation of that market.

A. Commission Has No Authority Under Section 205 Of The FPA To Require The Creation Of A Common Market

By conditioning its acceptance of the New PJM Companies' compliance filings on the "expeditious creation of a single market spanning a geographic area from New Jersey in the East to the Rocky Mountains in the West," [82] the Commission effectively mandated the creation of an RTO of a specific configuration and market structure before any such proposal has been filed by the RTOs. The Commission now is attempting to do under cover of Section 205 what the U.S. Court of Appeals for the District of Columbia Circuit recently concluded that it could not do under Section 203; namely, compel utilities to participate in a "particular interconnection or technique of coordination." [83] The Commission has no authority to require the New PJM Companies to participate in an RTO of a particular interconnection and technique of coordination as a condition of Commission acceptance of the New PJM Companies' RTO decisions.

The Commission has no authority under Section 205 of the FPA to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy. That authority is given to the Commission in Section 202 of the FPA. Moreover, even under Section 202 of the FPA, the Commission does not have any substantive powers "to compel any particular interconnection or technique of coordination." If the Commission has no such authority under Section 202 of the FPA, it

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[82] July 31 order at P 37.

[83] *Atlantic City*, 295 F.3d at 12 *citing Duke Power Co. v. FPC*, 401 F.2d 930, 943 (D.C. Cir. 1968) and *Central Iowa Power Coop., v. FERC*, 606 F.2d 1156, 1167-68 (D.C. Cir. 1979).

certainly cannot assume authority under Section 205 to compel a particular interconnection or technique of coordination, such as the joining of the Midwest ISO and PJM RTOs into a common market, as a condition of accepting utilities' RTO choices.

To paraphrase the Court in *Atlantic City*,[84] the Commission's expansive reading of its Section 205 jurisdiction cannot be reconciled with Section 202, which has been definitively interpreted to mean that coordination and interconnection arrangements are to be left to the voluntary action of utilities. It would be anomalous for the Commission to have jurisdiction under Section 205 to compel the New PJM Companies to form and to participate in a common market, when the Commission has no authority to do so under Section 202. Therefore, on rehearing, the Commission should remove this condition from its approval of the New PJM Companies' decisions to join the RTO formed by PJM.

B. By Accepting The New PJM Companies' Compliance Filings Subject To The Condition That PJM And The Midwest ISO Form A Common Market By October 1, 2004, The Commission Departs From The Criteria For RTOs Established In Order No. 2000 And The Commission's RTO Regulations

Neither Order No. 2000 nor the Commission's RTO regulations requires the creation of a common market in order to qualify for RTO status. In Order No. 2000, the Commission established that, at a minimum, an RTO must have certain characteristics and functions.[85]

In its July 31 order, however, the Commission imposed requirements on PJM, in order to be considered an "appropriately configured" RTO, and on the New PJM Companies, in order to join the PJM RTO, that are well beyond the requirements established in Order No. 2000 and the Commission's RTO regulations. Order No. 2000 does not require RTOs to join with other RTOs to form common markets in order to be deemed an "appropriately configured" RTO and does not

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[84] *Atlantic City*, 295 F.3d at 12-13.

[85] These required RTO characteristics and functions are codified in the Commission's RTO regulations. 18 C.F.R. § 35.34 (j) and (k) (2002).

base satisfaction of RTO standards on which utility joins a particular RTO. In approving the New PJM Companies' RTO decisions, the Commission should adhere to the RTO requirements established in Order No. 2000 and in the RTO regulations. "It is well-settled that an agency is legally bound to respect its own regulations, and commits procedural error if it fails to abide them."[86] The courts have made clear that the Commission may not ignore its own regulations to suit its convenience.[87] Therefore, on rehearing, the Commission should remove from its approval of the New PJM Companies' RTO choices, the condition that the Midwest ISO and PJM form a functional common market across the two organizations by October 1, 2004.

C. The Record In This Proceeding Does Not Support The Commission's Condition That The Common Market Be Formed By October 1, 2004

Finally, the record in this proceeding does not support the Commission's condition that the PJM/Midwest ISO common market be formed by October 1, 2004. The record shows that the Commission's October 1, 2004 deadline for the formation of the common market was, for all intents and purposes, plucked out of the proverbial "thin air."[88] At the Commission's July 17,

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[86] *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). If the Commission intends to reinterpret or revise Order No. 2000 to impose such new requirements on RTOs, it can do so only through notice-and-comment rulemaking procedures. The APA requires federal administrative agencies to follow notice and comment procedures when seeking to amend or repeal a rule. *Paralyzed Veterans of America, et al. v. D.C. Arena L.P., et al.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Montgomery Ward & Co., Inc. v. F.T.C.*, 691 F.2d 1322 (9th Cir. 1982). If an agency alters or enlarges obligations imposed by a preexisting regulation, the agency's action is substantive and notice and comment is required. *Aviators for Safe and Fairer Regulation, Inc. v. F.A.A.*, 221 F.3d 222, 226-27 (1st Cir. 2000). Similarly, an agency cannot "make a fundamental change in its interpretation of a substantive regulation without notice and comment." *Paralyzed Veterans of America*, at 586. Failure to allow notice and comment, where required, is grounds for invalidating the rule. *Auer v. Robbins*, 519 U.S. 452, 459 (1997). *See also, Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) and *National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001).

[87] *Service v. Dulles*, 354 U.S. 363 (1957). *See also, Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980) (FERC cannot "play fast and loose with its own regulations . . . [t]he fact that a regulation as written does not provide FERC a quick way to reach a desired result does not authorize it to ignore the regulation . . .").

[88] *Transcript of July 31, 2002 meeting at p. 135.* (CHAIRMAN WOOD: . . . on the October 2004 date, how did we arrive at that for implementation of the full common market, PJM [Midwest ISO], SPP? MR. CLEARY: Well, I believe Midwest ISO has committed that they could reach a single market-type structure, similar to PJM by early 2003. And the thought amongst Staff was giving them nine months more to actually push the button to make it common between the two, would be an adequate amount of time.)

2002 meeting, the CEO of the Midwest ISO, Jim Torgerson, told the Commission that "[o]ur plan is to have the Midwest [ISO] market up by the end of '03."[89] The Commission, however, has no basis in fact for concluding that nine months from the December 31, 2003 date projected by the Midwest ISO for the formation of its single market is sufficient time for the two RTOs to form a common market "spanning a geographic area from New Jersey in the East to the Rocky Mountains in the West." On the contrary, on July 17, Mr. Torgerson explained that, after the planned establishment of the Midwest ISO market at the end of 2003, creating a single common market with PJM is not as simple as the "push of a button" assumed by the Commission and could, in fact, take until 2005.[90]

In its August 15 filing, PJM states that PJM and the Midwest ISO have agreed that they can take five steps toward implementing the common market condition on or before October 1, 2004.[91] PJM further indicates that "during 2005 the parties plan to establish a single unit commitment process and single dispatch across the markets."[92] The record in this proceeding simply does not support the October 1, 2004 deadline in the July 31 order. Rather, the Commission should remove from its acceptance of the New PJM Companies' RTO choices the condition that a PJM/Midwest ISO common market must be formed by October 1, 2004, and

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89 Transcript of July 17, 2002 meeting at p. 194.

90 Transcript of July 17, 2002 meeting at p. 196 (MR. TORGERSON: What we'll do after '03 is start working on . . . the "enhanced market portal" which will allow customers to go into both at one interface, and then. . . how far do we go the next step? We've got to do a cost/benefit analysis. * * * We haven't done that cost/benefit yet. That is what we'd take to '05.)

91 PJM filing at pp. 1-2. These five steps are: "(a) integrating during 2003 all of the former Alliance Companies into the respective markets of the ISOs that they have chosen to join; (b) resolving all seams issues arising from the choices of the Alliance Companies and fully implementing solutions to the seams issues (c) conforming the markets in the Midwest ISO and PJM regions to the final requirements of the Standard Electricity Market Design rulemaking; (d) eliminating all rate pancaking by settlement among the parties, through the Commission proceeding initiated by the July 31 order, or by implementing the Standard Electricity Market Design tariff; and (e) implementing an Enhanced Market Portal to provide a single access and one-stop shopping across the combined Midwest ISO and PJM reigns, producing a functional common market." *See also* Midwest ISO filing at pp. 2-3.

92 PJM filing at p. 2 n.2. *See also* Midwest ISO filing at p. 2 n. 3.

accept the proposals contained in the PJM and Midwest ISO August 15 filings as a means of timely establishing the common market.

D. The Commission Should Permit The Voluntary And Consensual Development Of The Common Market

On rehearing, the Commission should remove this condition from its acceptance of the New PJM Companies' RTO choices and, instead, permit PJM, the Midwest ISO and transmission owners to continue their efforts to jointly and voluntary develop and file with the Commission a proposal for a common market. The Commission has no basis in fact for concluding that the PJM/Midwest ISO common market would not develop absent conditions and threats of "remedies." As Michael Kormos of PJM told the Commission on July 17, "[w]e believe that the single market design with Midwest ISO is the right answer, and we need to be moving there sooner rather than later."[93] Indeed, Mr. Kormos urged the Commission to "allow us to get back to doing our work and solve the issues as presented."[94]

In its August 15 filing, PJM stated that it had reached an agreement with the Midwest on "a plan to work steadily toward the development of the common market." Such voluntary approaches are consistent with Order No. 2000, where the Commission specifically did not foreclose "the possibility that an RTO may satisfy some of the minimum characteristics and functions by itself, while satisfying others through a strong cooperative agreement with neighboring RTOs to create a 'seamless trading area.'"[95] Therefore, the Commission should accept the plan developed by PJM and the Midwest ISO and, instead of making the development of a common market a condition of the New PJM Companies' ability to join PJM, the Commission should encourage PJM and the Midwest ISO to proceed as expeditiously as possible

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93 Transcript of July 17, 2002 meeting at p. 158.

94 Transcript of July 17, 2002 meeting at p. 158.

95 Order No. 2000 at 31,083.

to form a single common market, and to provide periodic reports on their progress. Then, if the Commission is not satisfied with that progress, and believes that the goal can realistically be achieved earlier than the parties' plan to do so, it can address the issue based on an assessment of a realistically achievable date to form the common market.

IX. THE COMMISSION ERRED IN REQUIRING THAT THE NEW PJM COMPANIES JOIN AN ITC

In the July 31 order, the Commission stated that "[o]ne mitigating factor in approving the RTO choices of the [former] Alliance Companies is the ability of National Grid to possibly bridge both organizations and manage the seams between Midwest ISO and PJM until a common market is developed."[96] Implicit in this statement is an assumption that the New PJM Companies will join PJM as part of an ITC operated by National Grid. In addition, the July 31 order provides that "there should be *pro forma* agreements under the respective tariffs of the Midwest ISO and PJM that provide for participation of new member and the delegation of functions to an ITC." [97] Implicit in this statement is a requirement that PJM's agreements under its tariff be identical to the agreements under the Midwest ISO's *pro forma* tariff. If the Commission does not clarify these rulings, as requested above, the Commission should reverse these rulings, as they are beyond the scope of the Commission's authority.

The Commission has no authority to require the New PJM Companies to join an ITC. This is a business decision, and the New PJM Companies should be able to join PJM as TOs if that makes the most sense for the companies and their customers. As the New PJM Companies have explained to the Commission, under the terms of their Memoranda of Understanding with

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96 July 31 order at P 43.

97 July 31 order at P 44.

PJM, they have the option of joining PJM either as part of an ITC or as individual TOs.[98] The New PJM Companies will make their respective determinations whether to join PJM as part of an ITC or as individual TOs depending on their conclusions as to which approach makes the most sense for the companies and their customers.

In Order No. 2000, the Commission determined that "[t]he characteristics and functions [of RTOs] could be satisfied by different organizational forms, such as ISOs, transcos, combinations of the two, or even new organizational forms not yet discussed in the industry or proposed to the Commission."[99] Consequently, the Commission did not "propose to require or prohibit any one form of organization for RTOs. . . ."[100] In the same vein, nothing in Order No. 2000 requires the New PJM Companies to participate in a Commission-approved RTO as part of an ITC. Furthermore, the Commission has no authority under the FPA to "compel any particular interconnection or technique of coordination," including joining an ITC in order to participate in an RTO. Therefore, the Commission has no authority, under either the FPA or Order No. 2000 to require the New PJM Companies to join an ITC as a condition of joining the RTO formed by PJM. Similarly, the Commission has no authority under the FPA to require PJM to make its agreements identical to agreements under the Midwest ISO's *pro forma* tariff. Such a requirement also is bad policy, as each RTO must retain the ability to address the unique facts and circumstances it faces, and should not be required to adopt the agreements of other RTOs which may face completely different facts and circumstances. Therefore, on rehearing, the Commission should remove from its acceptance of the former Alliance Companies' RTO choices, the conditions that the New PJM Companies join an ITC and that PJM's agreements

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98 Memorandum of Understanding filed in this proceeding on June 25, 2002, section 1.1. *See also* Transcript of June 26, 2002 meeting at pp. 353-355.

99 Order No. 2000 at 30,994.

100 Order No. 2000 at 30,994.

providing for participation of new members and the delegation of functions to an ITC be identical to those of the Midwest ISO.

X. THE COMMISSION ERRED IN REQUIRING THE NEW PJM COMPANIES TO MAKE FILINGS PURSUANT TO SECTION 203 OF THE FEDERAL POWER ACT TO TRANSFER OPERATIONAL CONTROL OF FACILITIES

In the July 31 order, the Commission also required the New PJM Companies to "file pursuant to section 203 to transfer operational control" of their facilities to PJM at such time as they seek to make effective their RTO choices. This requirement is directly in conflict with the D.C. Circuit's determination in *Atlantic City* that "[a] utility does not 'sell, lease, or otherwise dispose' of its facilities when it agrees to the changes in operational control necessary to initially join or to withdraw from an ISO,"[101] and the Court's ruling that "FERC has no jurisdiction to require preapproval" of such transfers of operational control under section 203.[102] The type of transfer of functional control of facilities to PJM contemplated by the New PJM Companies is of the same type which the Court in *Atlantic City* found to be outside of the Commission's Section 203 jurisdiction. Therefore, on rehearing, the Commission should withdraw this filing requirement.

XI. THE COMMISSION ERRED IN DIRECTING AEP, COMED, ILLINOIS POWER, MIDWEST ISO AND PJM TO PROPOSE A SOLUTION WHICH WILL EFFECTIVELY HOLD HARMLESS UTILITIES IN WISCONSIN AND MICHIGAN FROM ANY LOOP FLOWS OR CONGESTION THAT RESULTS FROM THE PROPOSED CONFIGURATION

In the July 31 order, the Commission "agree[d]" with protester assertions that "ComEd's participation in PJM creates: (1) a void at the center of the Midwest ISO and (2) a seam at the southern interface of the already constrained Wisconsin Upper Michigan System and such seam presents significant obstacles to the effective planning and construction needed to widen this

101 *Atlantic City*, 295 F.3d at 11.

102 *Atlantic City*, 295 F.3d at 13.

bottleneck and impedes management of loop flows and congestion."[103] The Commission also noted "the partial electric stranding of Wisconsin and Michigan given the RTO participation choices conditionally accepted."[104]

The decisions of the New PJM Companies to join PJM certainly have not "created" a non-contiguous configuration for the Midwest ISO. The Midwest ISO is non-contiguous today, and the Commission has found that this does not detract from the adequacy of the Midwest ISO's scope and configuration. With the addition of Ameren Corp. ("Ameren") and Northern Indiana Public Service Co. ("NIPSCo"), the Midwest ISO will be contiguous. In the order granting RTO status to the Midwest ISO, the Commission specifically found that the Midwest ISO's scope and configuration is adequate, recognizing the absence of direct interconnections between portions of its transmission system.[105]

The addition of Ameren and NIPSCo to the Midwest ISO would provide transmission connectivity to the non-contiguous portions of the Midwest ISO. Ameren will provide strong interconnections to portions of the Midwest ISO in Illinois, Indiana and Minnesota that are not contiguous today, and NIPSCo will connect the Michigan portions of the Midwest ISO to Indiana. The fact that the addition of Ameren and NIPSCo would render the Midwest ISO contiguous would appear to defy the suggestion that the Midwest ISO's scope and configuration will be rendered inadequate as a result of the former Alliance Companies' RTO choices. Nevertheless, as a condition of its acceptance of the New PJM Companies' RTO choices, the Commission directs AEP, ComEd, Illinois Power, the Midwest ISO and PJM to "propose a

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103 July 31 order at P 53.

104 July 31 order at P 53.

105 *Midwest Independent Transmission System Operator*, 99 FERC ¶ 61,302 (2001).

solution which will effectively hold harmless utilities in Wisconsin and Michigan from any loop flows or congestion that results from the proposed configuration."[106]

On rehearing, the Commission should remove this condition from its acceptance of the New PJM Companies' RTO choices, because (1) the Commission has not established, with substantial evidence in the record, that incremental loop flows, or reliability or cost impacts, will occur specifically as a result of the New PJM Companies' choices to join PJM, (2) the Commission's condition is unduly discriminatory, as it fails to take into account loop flows across the PJM system from the Midwest ISO, and (3) the Commission's condition is vague.

A. The Commission Has Not Established With Substantial Evidence In The Record That Incremental Loop Flows Or Congestion Will Occur As A Result Of The New PJM Companies' Choices To Join PJM

The Commission's "hold harmless" condition is arbitrary because it fails to establish with substantial evidence in the record that incremental loop flows, or reliability or cost impacts, will occur specifically as a result of the New PJM Companies' choices to join PJM. Similarly, the Commission has not established with substantial evidence in the record that congestion will occur specifically as a result of the New PJM Companies' choices to join PJM.

By definition, loop flows will occur because the New PJM Companies and utilities in Wisconsin and Michigan are under different transmission providers. However, flows do not change because of a decision to join a particular RTO. The Commission must take care not to require AEP, ComEd and Illinois Power to hold Michigan and Wisconsin utilities harmless from flows of energy that would occur in any event, regardless of which RTO the New PJM Companies decided to join.

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[106] July 31 order at P 53.

For example, today transactions involving the New PJM Companies result in flows over the Michigan and Wisconsin systems just as transactions involving companies connected to the Michigan and Wisconsin systems result in flows on the transmission systems of the New PJM Companies. This is the *status quo* and the New PJM Companies choices of RTO does not changes those flows or their impacts. AEP, ComEd and Illinois Power should not be required to hold utilities harmless with respect to loop flows that are not demonstrably the direct result of utility decisions to join PJM. Therefore, the Commission should remove this condition from its approval of the New PJM Companies' RTO decisions.

B. The Commission's Condition Is Unduly Discriminatory

Furthermore, the Commission's "hold harmless" condition is unduly discriminatory, as it fails to take account of the loop flows across the PJM system that will occur as a result of some the decisions of some of the former Alliance Companies to join the Midwest ISO. The Commission's condition presumes that the decision to join the Midwest ISO is the "correct" decision and the decision to join PJM is an "incorrect" decision and, consequently, the New PJM Companies must be penalized for their RTO choices, while the choices of those former Alliance Companies that elected to join the Midwest ISO are not penalized. This presumption on the part of the Commission is completely arbitrary, as well as unduly discriminatory.

There are intra-Midwest ISO transactions occurring today that create loop flows on the AEP or ComEd transmission systems which will be part of PJM. In fact, loop flows across the PJM system from Michigan and the rest of the Midwest ISO are greater than the loop flows across the Midwest ISO. In the July 31 order, however, the Commission failed to consider the potential for loop flows occurring as a result of some utilities decisions to join the Midwest ISO and the effect of such loop flows on transmission owners in PJM. By requiring that utilities

joining PJM hold other utilities joining the Midwest ISO "harmless" without also requiring that similarly situated transmission owners in PJM be held harmless, the Commission appears, in effect, to provide the opportunity for Michigan and Wisconsin parties to impose a monetary penalty on the decisions of some utilities to join PJM and to leave compliance with a condition of the order subject to the whims of those who have opposed the RTO choices of the New PJM Companies. Therefore, on rehearing, the Commission should either remove this condition from its acceptance of the New PJM Companies' RTO choices, or require that (1) the "hold harmless" condition be measured for operational impacts and reliability against an analysis that includes: (a) a determination, for the same set of transactions, of what different actions would have been taken by the RTO under different RTO choices, and (b) a determination of the actual impacts of those different choices on the Michigan and Wisconsin utilities, and (2) loop flows across the PJM RTO from the Midwest ISO also be evaluated and affected utilities similarly "held harmless."

C. The Commission Has Not Provided A Standard For Developing The Required Proposals

The July 31 order did not provide the standard for developing the required "hold harmless" proposals. The goal of the Commission's "hold harmless" condition should be to ensure coordination so that parties will not be affected as a result of the RTO choices that all 10 of the former Alliance Companies have made. Therefore, if the Commission does not remove the "hold harmless" condition on rehearing, the Michigan and Wisconsin utilities should be held "harmless" only following an analysis that includes: (a) a determination, for the same set of transactions, of what different actions would have been taken by the RTO under different RTO choices, and (b) a determination of the actual impacts of those different choices on the Michigan

and Wisconsin utilities. Unless the Commission adopts such a standard, the Commission's "hold harmless" condition is arbitrary and unduly discriminatory.

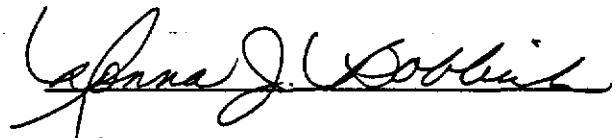
XII. CONCLUSION

The New PJM Companies appreciate the Commission's approval of their respective decisions to join PJM and reiterate their steadfast commitment to work with PJM, the Midwest ISO, National Grid, transmission owners in PJM and the Midwest ISO and other stakeholders to eliminate seams and to achieve a common market. However, as described above, the July 31 order imposes a number of inappropriate, unnecessary and cumbersome conditions that pose substantial risk to the New PJM Companies and establish inappropriate hurdles that simply must be addressed. Wherefore, for the foregoing reasons, the Commission should provide the clarifications requested herein, or: (1) reverse the finding that the former Alliance Companies' RTO decisions, standing alone, appear to produce unjust and unreasonable rates, terms and conditions for transmission services, (2) terminate the Section 206 proceeding in Docket No. EL02-111-000 to investigate the rates for through-and-out service under the Midwest ISO and PJM tariffs and associated revenue distribution, (3) reverse the finding that if the New PJM Companies join PJM, absent a single common market over the entire Midwest ISO/PJM region, PJM expanded to include the New PJM Companies would not be an "appropriately configured" RTO, (4) remove from the Commission's approval of the New PJM Companies' RTO choices, the condition that the Midwest ISO and PJM form a functional common market by October 1, 2004, (5) remove from its approval of the New PJM Companies' RTO decisions the requirement that the New PJM Companies join an ITC, and (6) remove from the Commission's approval of the New PJM Companies' RTO decisions the condition that AEP, ComEd, Illinois Power, the Midwest ISO and PJM propose a solution which will effectively hold harmless utilities in

Wisconsin and Michigan from any loop flows or congestion that results from the proposed configuration.

Furthermore, the Commission should: (1) reverse the finding that, absent conditions, there could be significant adverse operational and reliability effects leading to the former Alliance Companies' RTO choices not being in the public interest, and (2) reverse the requirement that the New PJM Companies file pursuant to section 203 to transfer operational control of their facilities to PJM.

Respectfully submitted,



Becky Bruner
Donna J. Bobbish
Vinson & Elkins L.L.P.
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004-1008
(202) 639-6500 (telephone)
(202) 639-6604 (fax)

Attorneys for American Electric Power Service Corporation, Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc., and Dayton Power and Light Company

August 30, 2002

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 30th day of August, 2002.

Donna J. Bobbish
Vinson & Elkins L.L.P.
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004-1008
(202) 639-6618